

2000

Peter Ennenga v. : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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IN THE UTAH SUPREME COURT

**In the Matter of the
Discipline of:**

PETER ENNENGA, #0999

Respondent

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BRIEF OF APPELLANT

Appellate No. 20000476-SC
Priority No. 5

Appeal From the Third District Court, Salt Lake County,
Judge Stephen Henriod

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code, section 78-2-2(3)(c), and Utah Constitution article VIII, section 4.

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

There are two issues on appeal: whether the District Court erred in failing to impose the sanction of disbarment against the Respondent, Peter M. Ennenga, for his misappropriation of money from a client and other professional misconduct, and whether the District Court gave undue weight to factors in mitigation of Ennenga's misconduct. These issues were preserved in the District Court through closing argument and through the Sanctions Hearing Brief submitted to the court. [R. 411 at 106-124; 326-341]

Both of these issues are questions of law. On appeal, the Court may draw its own inferences from the District Court's factual determinations, which are reviewed under a clearly erroneous standard. See In re Pendleton, 2000 UT 77, ¶ 20. While the Court gives serious consideration to the District Court's rulings and factual findings, it "may make an independent judgment regarding the appropriate level of discipline' if the evidence warrants." See id. (quoting In re Knowlton, 800 P.2d 806, 809 (Utah 1990)).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 6. Aggravation and Mitigation.

6.1. Generally.

After misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose.

6.2. Aggravating circumstances.

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating circumstances may include:

- (a) prior record of discipline;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved; and
- (k) illegal conduct, including the use of controlled substances.

6.3. Mitigating circumstances.

Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating circumstances may include:

- (a) absence of a prior record of discipline;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify the consequences of the misconduct involved;
- (e) full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) good character or reputation;
- (h) physical disability;
- (i) mental disability or impairment, including substance abuse when:
 - (1) The respondent is affected by a substance abuse or mental disability; and
 - (2) The substance abuse or mental disability causally contributed to the misconduct; and
 - (3) The respondent's recovery from the substance abuse or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) The recovery arrested the misconduct and the recurrence of that misconduct is unlikely;

(j) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay;

(k) interim reform in circumstances not involving mental disability or impairment;

(l) imposition of other penalties or sanctions;

(m) remorse; and

(n) remoteness of prior offenses.

6.4. Factors which are neither aggravating nor mitigating.

The following circumstances should not be considered as either aggravating or mitigating:

(a) forced or compelled restitution;

(b) withdrawal of complaint against the lawyer;

(c) resignation prior to completion of disciplinary proceedings;

(d) complainant's recommendation as to sanction; and

(e) failure of injured client to complain.

STATEMENT OF THE CASE

A. The Nature of the Case, the Course of Proceedings, and Its Disposition in the District Court

This is an attorney discipline matter. The District Court suspended the Respondent, Peter M. Ennenga, under circumstances in which he should have been disbarred. The Utah State Bar's Office of Professional Conduct ("OPC") appeals the District Court's decision, and respectfully urges this Court to reverse it, and instead to enter an order of disbarment against Ennenga.

The OPC filed a Complaint against Ennenga in August 1997 and a First Amended Complaint in September 1997. [R. 1-68; 145-165; 75-144] The District Court granted partial summary judgment as to some counts of the OPC's complaint. [R. 268]

On January 11, 2000, the District Court presided over a trial to determine whether Ennenga violated the Rules of Professional Conduct ("Rules"). [R. 309-314] By means of a Memorandum Decision entered January 18, 2000, the court issued

findings of fact on the basis of which it concluded that Ennenga violated the Rules. [R. 309-314]

Accordingly, the matter proceeded to a sanctions hearing on March 28, 2000. [R. 364] After the sanctions hearing, the court made Findings of Fact and Conclusions of Law, and entered an order sanctioning Ennenga by suspending him from the practice of law for a period of six months. [R. 376-385; R. 389-392]

B. Statement of the Facts

1. Proceedings Before the OPC Filed Its Complaint in District Court

The OPC received informal complaints from several of Ennenga's clients, and these are the bases for the disciplinary action against him. [R. 2-3; 146-148] In each matter, the Ethics and Discipline Committee of the Utah State Bar conducted Screening Panel hearings, and voted to issue a formal complaint against Ennenga. [R. 2-3; 146-148] Specifically, Rodney Glover filed an informal complaint against Ennenga on February 8, 1993, and the Screening Panel hearing was on October 19, 1993; Alice Durrant-Funk filed one on April 2, 1993, and the Screening Panel heard it on October 19, 1993; Taner Yarbil filed one on April 13, 1995, and it was presented for a Screening Panel hearing on February 1, 1996; and JoAnn Wilson filed one on May 30, 1996, and the matter reached a Screening Panel hearing on January 30, 1997. [R. 2-3; 146-148]

The OPC initiated this attorney discipline action by filing a complaint against Ennenga in District Court on August 6, 1997. [R. 1-68] The initial complaint included allegations and counts arising from the Glover, Yarbil, and Wilson matters, but not the Durrant-Funk matter. [R. 1-68] With Ennenga's consent, the OPC filed a First

Amended Complaint on September 12, 1997, which included allegations and counts arising from the Durrant-Funk matter. [R. 73-74; R. 145-165; 75-144]¹

In August 1998, the OPC moved for Partial Summary Judgment as to some of the counts of its First Amended Complaint. [R. 172-174; 175-186] The District Court granted summary judgment as to two counts that involved Ennenga's failure to respond to the OPC's requests for information on four separate occasions in the Yarbil matter and in the Durrant-Funk matter, in violation of Rule 8.1(b) of the Rules. [R. 268-269; 159-160; 162]

2. The District Court's Findings of Fact and Conclusions of Law Establish That Ennenga Committed Serious Professional Misconduct

Ennenga collected \$18,000 on behalf of a client, JoAnn Wilson, who asked him to hold the money in an interest-bearing trust account. [R. 309] Instead of putting the money in trust, Ennenga deposited a portion into his checking account and retained the balance in the form of a cashier's check. [R. 309-310] Ultimately, Ennenga spent all of Wilson's money for personal purposes. [R. 310] Although Wilson's accountant requested an accounting and Wilson tried to contact Ennenga about the money, these efforts were fruitless despite promises from Ennenga that he would pay Wilson the money. [R. 310] Ennenga paid Wilson only after she had filed a complaint against him with the OPC. [R. 310] Ennenga used his position as Wilson's attorney and fiduciary to

¹ The index of the District Court record shows the Consent to Amend Complaint as page numbers 73-144. This is inaccurate, inasmuch as the consent is merely two pages long. Page numbers 75 through 144 are the exhibits, albeit out of their proper alphabetical sequence, which were attached to the First Amended Complaint, numbered pages 145 to 153 and 155 to 165. Pages 153 and 154 are a Notice of Informal Complaint that the OPC believes should have been part of Exhibit "B" attached to the First Amended Complaint; instead, they have been inserted in the middle of that document.

obtain possession of her money. [R. 310] Ennenga breached his fiduciary duty and converted Wilson's funds for his own use without her permission or knowledge. [R. 310]

Taner Yarbil retained Ennenga in June 1993 to represent him in a civil action. [R. 310] Although Ennenga filed a Complaint and served one of the two defendants, he discontinued work on the case and did not inform Yarbil that he would no longer pursue the matter. [R. 311]

The OPC requested information from Ennenga about the Wilson, Yarbil, and Glover complaints, but Ennenga failed to timely respond to any of these requests. [R. 312]²

On the basis of the foregoing findings, the District Court concluded that Ennenga violated the following Rules: Rule 1.4 (Communication), 1.15 (Safekeeping Property), Rule 8.1(b) (Bar Admission and Disciplinary Matters), Rule 8.4(b) (Misconduct—Committing a Criminal Act That Reflects Adversely on the Lawyer's Honesty), and Rule 8.4(c) (Misconduct—Engaging in Conduct Involving Dishonesty). [R. 312] The Court also found that "the statute of limitations bars the OPC's complaint against Ennenga on the Glover matter."³ [R. 313]

3. The Sanctions Hearing

The case proceeded to a sanctions hearing on March 28, 2000. [R. 376] The District Court concluded that disbarment is the appropriate presumptive sanction for Ennenga's misconduct. [R. 379] Having identified the appropriate presumptive

² The OPC had previously won summary judgment as to Ennenga's failure to cooperate with regard to its investigation of the Durrant-Funk matter, as well as the Yarbil matter. [R. 268-269; 159; 162]

³ The OPC does not appeal this ruling.

sanction, the court analyzed the circumstances that may be considered and weighed in deciding what ultimate sanction to impose. [R. 379-380]

The court made the following findings as to aggravating factors. Ennenga had prior discipline, but its nature differed from his misconduct in the Wilson matter.⁴ [R. 380] Ennenga acted to benefit himself and his family. [R. 380] There was no pattern of misconduct “excepting [Ennenga’s] reluctance to participate in the disciplinary process against him.” [R. 380] There were multiple offenses, but from the court’s perspective, there was one serious offense and several minor offenses. [R. 380] Ennenga obstructed the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary authority. [R. 380] “Mr. Ennenga has admitted the wrongful nature of the misconduct, has explained his involvement completely, and expresses sincere remorse and has been remorseful since the misconduct took place. He, however, did not openly admit any of these things until shortly before the trial.” [R. 380-381] Neither of the victims was particularly vulnerable, and “Ms. Wilson, in fact, made the misconduct too easy.” [R. 381] Ennenga practiced law for twenty-one years before the date of the misappropriation. [R. 381] Ennenga made full restitution, “but did not do so until he was under duress.” [R. 381] “The only illegal conduct that occurred here was the misappropriation of funds.” [R. 381]

The District Court also made the following findings as to mitigating factors. Ennenga suffered “personal and emotional problems as a result of his inability to meet his regular financial obligations.” [R. 381] Ennenga made full restitution to Wilson,

⁴ The OPC observes that although the previous misconduct did not involve misappropriation of client funds, Ennenga testified that “in one of the cases I might have

although it was “not particularly timely.” [R. 381] Witnesses testified that Ennenga “was a fine attorney with an outstanding reputation for honesty.” [R. 382] “There was a significant delay in this matter” that is “attributable as much or more to the OPC as it is to Mr. Ennenga;” but Ennenga “has not demonstrated prejudice resulting from the delay.” [R. 382] The court found that there was interim reform, evidenced by the fact that Ennenga has had no valid complaints filed against him for misconduct after 1992. [R. 383] Ennenga “is very remorseful and has been since the 1992 misconduct.” [R. 383]

The court found and concluded that “[t]he mitigating circumstances outweigh the aggravating circumstances.” [R. 383] It further concluded that, “Weighing the misconduct of Mr. Ennenga against the misconduct of Tanner, Stubbs, Babilis and Ince shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and the time elapsed between misconduct and sanction.” [R. 383]

Based upon the foregoing findings and the conclusions it drew therefrom, the District Court entered an order suspending Ennenga from the practice of law for a period of six months, followed by a three-year period of supervision by “an experienced attorney.” [R. 389] The court also required Ennenga to “participate in psychological or psychiatric counseling prior to practicing law again.” [R. 390]

4. The Delay In the Proceedings

Nearly four years elapsed between Ennenga’s misappropriation of Wilson’s money and Wilson’s filing an informal complaint with the OPC. [R. 410 at 4; 2-3; 146-

misled the clients into thinking that I was going to do something that I wasn’t at that

148] Wilson testified that she asked Ennenga to put into an escrow account the \$18,000 he collected on her behalf. [R. 410 at 4-5] Although she was unsuccessful in getting Ennenga to give the money to her, she assumed this had to do with reasons other than the truth of the matter: that Ennenga had misappropriated it. [R. 410 at 5-9] Wilson did not learn what became of the \$18,000 until her informal complaint had been heard by the Screening Panel. [R. 410 at 9-11] Indeed, in response to a question about whether she asked Ennenga where the funds were, she testified, "No, I didn't ever question where the funds were[.] I had told him to put them in an escrow account." [R. 410 at 19] Thus, Wilson did not realize that Ennenga had misappropriated her money until *after* she had complained to the OPC.

The District Court's findings establish that Ennenga obfuscated the status of the money: Wilson's accountant requested an accounting, Wilson tried to contact him about it, Ennenga promised he would pay her. [R. 310] Ennenga's testimony on this point included the following: "I never told JoAnn Wilson's [sic] Wilson that I had used her money. At the same time, I never told JoAnn Wilson that she would never get her money, that her money somehow had vanished. I basically used the language to keep her in suspense about what was happening with her money." [R. 411 at 89] He added that he responded to Wilson's requests "[o]nly when cornered" [R. 411 at 90] Ennenga also agreed that "it's fair to say" that the things he told Wilson kept her on hold. [R. 411 at 101]

Wilson filed her complaint on May 30, 1996. [R. 2-3; 146-148] The case proceeded to a Screening Panel hearing on January 30, 1997. [R. 2-3] The Complaint

point in time prepared to do." [R. 411 at 17]

was filed approximately six months later, during which time the OPC met with Ennenga and there were discussions with his counsel. [R. 411 at 103-105]

Although there was no further on-the-record activity in the court case until August 1998, the OPC made a couple of overtures to settle the case predicated upon the newly announced decisions of this Court in the Babilis and Ince matters. [R. 411 at 105; 135-136] As counsel explained to the District Court, the OPC hoped that these decisions would assist it in resolving the Ennenga matter without the necessity of taking it to trial. [R. 411 at 135-136]

Settlement efforts failed, however, and the OPC filed its Motion for Partial Summary Judgment, and served discovery requests on Ennenga in the form of interrogatories and requests for production of documents. [R. 187-188] When the time for answering those requests expired without a response, the OPC requested Ennenga's cooperation, and warned it would seek an order compelling him to respond. [R. 219; 225] Thereafter, the OPC agreed to extend the time for response pending the District Court's ruling on the OPC's Motion for Partial Summary Judgment. [R. 219; 226] Approximately one month later, the OPC asked Ennenga to proceed. [R. 219; 226] When Ennenga again failed to answer the requests, the OPC telephoned his counsel, who again requested an enlargement of time. [R. 219] The OPC acquiesced, but cautioned it would seek an order compelling responses if they were not forthcoming. [R. 219-220] Still, Ennenga failed to respond to the discovery requests, and in January 1999, the OPC was forced to ask the District Court for assistance, which it granted in an Order Compelling Discovery entered February 26, 1999. [R. 218-230; 240-241]

Ennenga did not serve answers to the OPC's discovery requests until March 23, 1999.⁵
[R. 245]

In addition to impeding the progress of discovery, Ennenga made no effort to hasten the pace of the litigation. His testimony acknowledged that neither he nor his attorney initiated any effort to move the case forward. [R. 411 at 8] Ennenga was not aware of any efforts by his counsel to expedite the case, and he never requested an expedited hearing. [R. 411 at 8]

5. Ennenga Concealed His Misconduct From His Colleagues, Clients, and His Ecclesiastical Leader and Told His Wife About It Only When Paying Restitution Became an Issue

Thomas Lowe, was Ennenga's partner during the time Ennenga misappropriated Wilson's money. [R. 411 at 36-38] Lowe testified that by taking Wilson's money and placing it in his own account instead of the firm trust account, Ennenga violated firm policy. [R. 411 at 37-38] Lowe agreed that in doing so, Ennenga deceived him and the other partners of the firm. [R. 411 at 38] Moreover, Ennenga concealed his actions from Lowe for a number of years: Lowe first learned of the Wilson situation when the firm received a letter from her attorney. [R. 411 at 38-39]

Ennenga's long-time friend and client, Kent Chard, testified that he had only known for a few days before trial of Ennenga's misconduct. [R. 411 at 55, 60]

Ennenga's ecclesiastical leader, Scott Williams, testified that Ennenga was remorseful, but Williams had only known about the Wilson matter for one week prior to the sanctions hearing. [R. 411 at 65-66]

⁵ Additionally, although the District Court ordered Ennenga to pay the OPC's attorney's fees in connection with his failure to answer its discovery requests, Ennenga did not pay the fees until nearly one year later. [R. 411 at 11-12]

Ennenga's wife, Nancy Ennenga, testified that she first learned of the Wilson matter three years before trial (approximately four years after the misappropriation), "in connection with paying the money back." [R. 411 at 81-82]

SUMMARY OF ARGUMENT

The District Court's decision to suspend Ennenga, rather than disbar him, is contrary to established law: Ennenga should have been disbarred for his misappropriation of a client's money. Moreover, the court's conclusions concerning certain mitigating factors contravene the clear language of the Standards for Imposing Lawyer Discipline ("Standards") and the guidance given by this Court in recent attorney discipline decisions. Because of their significant role in the analysis of the District Court's error in imposing the sanction of suspension in lieu of the appropriate presumptive sanction of disbarment, the OPC will first address the court's errors in identifying and weighing mitigating factors.

ARGUMENT

I. The District Court Erred in Its Analysis of the Mitigating Factors

The District Court identified as mitigating circumstances several factors that either do not meet the criteria set forth in the Standards or are inconsistent with this Court's guidance as to how they should be weighed. Although it is difficult to know how much weight the court placed on each of the factors it identified, its conclusion was that "[t]he mitigating circumstances outweigh the aggravating circumstances." [R. 383] The court added that "[w]eighing the misconduct of Mr. Ennenga against the misconduct of Tanner, Stubbs, Babilis and Ince shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and the time

elapsed between misconduct and sanction.” [R. 383] Thus, although there were numerous significant aggravating factors,⁶ including dishonest or selfish motive, obstruction of the disciplinary process, substantial experience in the practice of law, failure to make restitution until under duress, and illegal conduct in the form of misappropriation, the District Court nevertheless concluded that the mitigating factors were so substantial as to warrant departure from the presumptive sanction of disbarment. This was error.

A. The District Court Erred in Concluding That Ennenga’s Personal Problems Resulting From Financial Problems Constitute a Mitigating Circumstance

The District Court found that Ennenga misappropriated Wilson’s money because of a history of poor business practices that resulted in financial problems so severe he could not make mortgage payments in a timely fashion. [R. 378] Ennenga used the money he misappropriated from Wilson to prevent foreclosure on his house. [R. 377-378] The District Court concluded that “Mr. Ennenga was suffering personal and emotional problems as a result of his inability to meet his regular financial obligations.” [R. 381] The court’s statement that “[w]eighing the misconduct of Mr. Ennenga against the misconduct of Tanner, Stubbs, Babilis and Ince shows a significant difference in the seriousness of the conduct, both as to the number of incidents, *the motive of the attorney*, and the time elapsed between misconduct and sanction[]” suggests it

⁶ The District Court found that Ennenga has a prior record of discipline, which is identified as an aggravating factor, “but not of the same nature as the Wilson misconduct.” [R. 380] Under its analysis of the mitigating circumstances, which include “[a]bsence of a prior record of discipline,” the court found that “there is a prior record of discipline, but less significant tha[n] 8.4 and not of the same sort of misconduct.” [R. 381] The court thus appears to have noted Ennenga’s prior record of discipline as an aggravating circumstance, but assigned it little weight.

accorded this factor substantial weight in deciding to diverge from the presumptive sanction of disbarment. [R. 383 (emphasis added)]

The Standards indeed identify as a mitigating circumstance “[p]ersonal or emotional problems.” Rule 6.3(c), Standards. An attorney’s financial problems are entitled to little weight, however, as a mitigating circumstance. See In re Ince, 957 P.2d 1233, 1237-1238 (Utah 1998) (Ince’s numerous health and financial problems did not mitigate theft of firm and client money); see also Louisiana State Bar Ass’n v. Krasnoff, 488 So.2d 1002, 1006-1007 (La. 1986) (attorney’s personal adversity does not greatly mitigate disciplinary violations). The New Jersey Supreme Court put it thus:

It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; *nor does it matter that the pressures on the lawyer to take the money were great or minimal.* The essence of [In re Wilson] is that the relative moral quality of the act, measured by these many circumstances that surround both it and the attorney’s state of mind, is irrelevant: *it is the mere act of taking your client’s money knowing that you have no authority to do so that requires disbarment.*

The misuse of clients’ money as a matter of convenience to defray personal expenses such as for a vacation and a party, does not ameliorate the ethical misconduct. *Family financial pressures cannot excuse an attorney’s ethical dereliction.*

In re Blumenstyk, 704 A.2d 1, 12 (N.J. 1997) (emphasis added; citations omitted).

The root cause of Ennenga’s personal problems was his failure to live within his means, and his willingness to finance his mortgage to the detriment of his client. The District Court’s conclusion on this point is a signal to lawyers that their financial problems are sufficient justification to overcome severe sanction for their misconduct, and it is error because it is contrary to the direction given by this Court in Ince.

B. The District Court Erred in Concluding That Ennenga's Compelled Restitution Is a Mitigating Circumstance

The Standards identify as a mitigating circumstance “timely, good faith effort to make restitution or to rectify the consequences of the misconduct involved.” Rule 6.3(d), Standards. The District Court found that Ennenga “only repaid [Wilson] in 1997 after her informal complaint against him was filed in 1996 and she had also retained an attorney to take action against Mr. Ennenga for the money.” [R. 378] Ennenga eventually paid Wilson the principal, plus interest and attorney’s fees. [R. 378-379] The court additionally found that “Mr. Ennenga’s effort was not particularly timely, but he did completely rectify the consequences to Ms. Wilson.” [R. 381]

The District Court did not mention this factor when it compared Ennenga’s misconduct with that of the attorneys in previous discipline cases, so perhaps this was not a significant component of its decision to suspend rather than disbar Ennenga. Because the point is ambiguous, however, the OPC is compelled to address it.

The Standards require both that the restitution be made *and* that it be timely if it is to constitute mitigation. Here, restitution was made, but it was not timely, and there is unambiguous precedent from this Court to the effect that restitution made after an attorney’s misconduct has been detected does not qualify as a mitigating factor. In Ince, the Court explained why:

After an attorney’s misconduct is discovered, restitution can be characterized simply as the ‘honesty of compulsion’ and may be evidence only of the lawyer’s ability to raise the money or desire to avoid being disbarred rather than of a sincere desire to rectify the wrongdoing.

In re Ince, 957 P.2d at 1238; see also Rule 6.4(a), Standards (“Forced or compelled restitution” is a circumstance that “should not be considered as either aggravating or

mitigating.”); Nebraska State Bar Ass’n v. Gridley, 545 N.W.2d 737, 740 (Nebr. 1996) (“The fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients’ funds nor any reason why a lawyer should not receive a severe sanction.”).

The Supreme Court of New Jersey discussed it as follows: “The restitution of misappropriated funds does not alter or obscure the fact that when restitution is used to support the contention that the lawyer intended to ‘borrow’ rather than steal, it simply cloaks the mistaken premise that the unauthorized use of clients’ funds is excusable when accompanied by an intent to return them. The act is no less a crime. Lawyers who ‘borrow’ may, it is true, be less culpable than those who had no intent to repay, but the difference is negligible in this connection.” In re Blumenstyk, 704 A.2d 1, 10-11 (N.J. 1997)

Because Ennenga did not attempt to ameliorate his wrongdoing until long after he was caught and confronted, and indeed only after Wilson reported it to the OPC and hired counsel to take action against him, restitution is entitled to no weight in mitigation of his misconduct.

C. The District Court Erred in Concluding That Delay in the Disciplinary Proceedings Constituted a Mitigating Circumstance

The Standards identify as a mitigating circumstance “unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay.” Standards, Rule 6.3(j). The District Court found as follows:

There was a significant delay in this matter. While Ms. Wilson did not file her complaint against respondent until 1996, other complaints with respect to other matters referred to above were filed in 1993. The OPC has been

conducting an investigation into this matter since 1993, and only filed its Complaint in August of 1997, and its First Amended Complaint in September of 1997.⁷ Mr. Ennenga certainly didn't facilitate moving the case forward on a faster track in his refusal to provide information to the Bar through the discovery process, but the delay is attributable as much or more to the OPC as it is to Mr. Ennenga. *Mr. Ennenga has not demonstrated prejudice resulting from the delay.*

[R. 382]

As a threshold matter, the OPC observes that the District Court did not find that the delay was unreasonable. [R. 382] Nevertheless, the court appears to have given this factor considerable weight as a mitigating circumstance, for it subsequently concluded that “[w]eighing the misconduct of Mr. Ennenga against the misconduct of Tanner, Stubbs, Babilis and Ince shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and *time elapsed between misconduct and sanction.*” [R. 383]

The court’s findings suggest it weighed the factors causing the delay and concluded that Ennenga contributed to it less than the OPC. This is not the equivalent of finding that Ennenga “did not substantially contribute to the delay.” Moreover, Ennenga’s failure to disclose to Wilson the status of her money delayed her discovery of his misappropriation, and was surely a factor contributing to the four-year interval between the misappropriation of Wilson’s filing of her informal complaint. Counting the delay in Ennenga’s favor would reward his long-term concealment of his misconduct.

⁷ The most serious complaints against Ennenga were the Wilson matter and Ennenga’s repeated failure to cooperate with the OPC. The OPC filed its Complaint in District Court within approximately six months of the Screening Panel hearing on the Wilson matter, and the entire disciplinary case proceeded to trial in less than three years.

Even more significantly, however, the District Court explicitly found there was no evidence of prejudice to Ennenga. Indeed, Ennenga's testimony acknowledged that the delay worked to his benefit, insofar as it permitted him to continue practicing law. [R. 411 at 9] Additionally, he testified that, "The longer I didn't hear about this case the better off I was. The more functional I was. I wasn't interested in being real proactive with this." [R. 411 at 96]

This Court considered whether a four-year delay in the disciplinary proceedings should be treated as a mitigating factor in the Babilis case. Although the District Court found that Babilis had been "prejudiced to some degree by the delay in both ability to recollect and the effect adverse publicity has had on him personally and on his practice," the Court concluded the delay was not prejudicial. Babilis, 951 P.2d 207, 217 (Utah 1997). The Court observed:

There are no facts indicating that Babilis opposed the delay or even complained about it. Indeed, at least some of the delay was apparently for his benefit so that he could resolve other pressing concerns. The disciplinary court concluded that the cloud of disrepute engendered by bad publicity on '[r]espondent and his practice [was] not insubstantial.' Nevertheless, Babilis was the person responsible for this, and it is difficult to comprehend how the delay harmed his reputation; *rather, it enabled him to push back the day of judgment.*

Id. (emphasis added).

The delay in the proceedings permitted Ennenga to postpone accountability, and as the District Court found, Ennenga failed to demonstrate prejudice resulting from the delay. Under these circumstances, the court's conclusion that the delay is a mitigating circumstance constitutes error.

D. The District Court Erred in Concluding That the Absence of Complaints Against Ennenga Since the Time He Misappropriated Wilson's Money Constitutes Interim Reform

The Standards identify as a mitigating circumstance “interim reform” Rule 6.3(k), Standards. The District Court found that “Mr. Ennenga has not had any valid complaints filed against him regarding misconduct after 1992[]” apparently in support of its conclusion that there was interim reform. [R. 383]

The OPC does not dispute the absence of further complaints against Ennenga, but believes the District Court erred in concluding this constitutes interim reform in the context of a misappropriation case. Interim reform might be meaningful as mitigation in cases that do not involve an attorney's basic integrity and honesty.⁸ It has little value, however, in mitigation of misconduct arising from theft of client funds and other acts going to the attorney's fundamental lack of integrity.

E. The District Court Erred in Concluding That Ennenga's Eleventh-Hour Expressions of Remorse Constitute Remorse Within the Meaning of the Standards

The Standards identify “remorse” as a mitigating circumstance. See Standards, Rule 6.3(m). The District Court found that “Mr. Ennenga is very remorseful and has been since the 1992 misconduct.” [R. 383] Elsewhere, the court found that “Mr. Ennenga has admitted the wrongful nature of the misconduct, has explained his involvement completely, and expresses sincere remorse and has been remorseful since the misconduct took place. He, however, did not openly admit any of these things until shortly before trial.” [R. 380-381] Additionally, although Ennenga testified that he is remorseful, he also stated, “I made a mistake, and now I keep having it thrown at me

time after time. I think it [sic] about it often enough without it being thrown at me.” [R. 411 at 96-97]

In the Ince case, this Court stated that Ince’s “interim remorse and reform is not compelling.” Ince, 957 P.2d at 1238. The Court noted that although Ince’s law firm confronted him with evidence of misconduct, he “was not forthcoming.” Id. at 1238. Additionally, Ince admitted the misconduct “only when confronted with specific evidence and was never completely willing to admit to undiscovered misconduct.” Id. The Court concluded that, “[r]ather than seeming truly sorry for his conduct and admitting to it, Ince seemed sorry only that he had been caught.” Id.

This Court also had occasion to consider remorse as a mitigating factor in the Tanner decision, which stated, “Tanner’s remorse at trial is irrelevant. Naturally, anyone going through a trial for [stealing client money and forging documents] would feel remorse after getting caught. Instead, the remorse question closely relates to acknowledgement of wrongful conduct: did Tanner feel remorse about his behavior *before* getting caught, and was he motivated by remorse in making amends? . . . The district court’s ruling that Tanner failed to acknowledge the wrongful nature of his conduct makes clear that Tanner was unmotivated by remorse until after discovery.” Tanner, 960 P.2d 399, 403 (Utah 1998) (citation omitted).

As these cases make clear, remorse is shown through honest and uncompelled disclosure of the misconduct before it is discovered by others and an attempt to rectify its consequences without being forced to do so. Ennenga’s expressions of remorse at trial simply do not qualify. Ennenga had many opportunities to tell Wilson the true

⁸ For example, an attorney’s interim reform might mitigate misconduct in the form

status of her money, and yet he chose not to. Instead, he repeatedly assured her she would receive it, then reneged on his promises. As the District Court found, “he stalled her when she started requesting the funds by avoiding discussion of the funds’ whereabouts or the specific time that he would remit them to her. Mr. Ennenga testified that he didn’t want to lie to Ms. Wilson, but he didn’t want to admit that he had taken the funds and no longer had them either. . . . [H]e only repaid her in 1997 after her informal complaint against him was filed in 1996 and she had also retained an attorney to take action against Mr. Ennenga for the money.” [R. 378] Thus, Ennenga never told her he had stolen her money and used it for his own purposes, and didn’t “come clean” until after Wilson retained counsel to assist her in collecting it. Admitting his misconduct and re-paying Wilson were not the acts of a remorseful person; they were the acts of someone with no viable alternatives.

Likewise, Ennenga failed to disclose his conduct to those in whom a genuinely remorseful person would confide: his partner, his wife, his ecclesiastical leader. Ennenga told his wife what he had done in connection with paying restitution. [R. 411 at 81-82] His former partner learned of it when the firm received a letter from Wilson’s counsel. [R. 411 at 38-39] His ecclesiastical leader learned of the misconduct only on the eve of the sanctions hearing. [R. 411 at 65-66]

II. The District Court Appears to Have Assigned Too Little Weight to the Aggravating Factors

A. Ennenga’s Selfish Motive Is a Substantial Aggravating Circumstance

The District Court found that Ennenga had a selfish motive: “Mr. Ennenga’s act was to benefit himself and his family.” [R. 380] Elsewhere, the court found that

of failure to diligently communicate with a client or prosecute cases.

Ennenga misappropriated the money because his “history of poor business practices” resulted in financial problems such that “he could not make his mortgage payments when due.” [R. 378] The court nevertheless concluded that the mitigating circumstances outweighed the aggravating circumstances and there was a “significant difference in the seriousness of the conduct [as compared with that of Tanner, Stubbs, Babilis, and Ince], both as to the number of incidents, *the motive of the attorney*, and the time elapsed between misconduct and sanction.” [R. 383 (emphasis added)].

With the exception of Stubbs, each of the respondents referred to by the court was selfishly motivated to misappropriate money. Indeed, Ince was motivated to pay for a house he could not afford. The District Court’s conclusion that Ennenga’s selfish motive is entitled to little weight was error.

B. The District Court Erred in According Little or No Weight to Ennenga’s Pattern of Misconduct, the Fact That He Committed Multiple Offenses, and Obstructed the Disciplinary Proceedings

The Standards recognize “a pattern of misconduct” as an aggravating circumstance. See Rule 6.2(c), Standards. The District Court “does not find a pattern of misconduct in this matter, *excepting [Ennenga’s] reluctance to participate in the disciplinary process.*” [R. 380 (emphasis added)]. The court thus appears to have minimized “pattern of misconduct” as an aggravating circumstance, and there is no mention of it when the court weighed the factors.

The Standards also recognize “[m]ultiple offenses” as an aggravating circumstance. See Rule 6.2(d), Standards. With respect to this factor, the court found that “[w]hile consideration of the rules violated would seem to indicate multiple offenses, it is the trial court’s perspective that *there were minor offenses and one stand-alone*

serious offense, namely the Wilson matter.” [R. 380] The minor offenses to which the court refers include Ennenga’s repeated failure to cooperate with the OPC’s investigations of the complaints against him. [R. 312]

Finally, the Standards identify “[o]bstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary authority.” See Rule 6.2(e), Standards. The District Court found that “Ennenga admits this.” [R. 380] Without discussing this factor, the court concluded that mitigating circumstances outweighed the aggravating circumstances, and thus must not have accorded it substantial weight. [R. 383]

The court’s trivialization of Ennenga’s repeated failure to cooperate with the disciplinary proceedings is baffling, in light of its findings that (a) he violated Rule 8.1(b) of the Rules of Professional Conduct; (b) “in three separate instances he failed to provide information to the OPC through the normal discovery process in this case;” (c) he “interfered with the pending disciplinary action against him;” and (d) he admitted that he obstructed the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary authority.” [R. 376-377, 379-380]

Ennenga’s repeated failure to cooperate with the disciplinary proceedings is a serious violation in and of itself. In this case, because the misappropriation of client money warranted disbarment as the presumptive sanction, Ennenga’s multiple instances of failure to cooperate, which took many forms, and constituted the obstruction of the disciplinary proceedings, should have weighed heavily in the balance and vigorously argues against a downward departure from the presumptive sanction.

C. Ennenga's Failure to Openly Admit the Wrongful Nature of the Misconduct Constitutes an Aggravating Circumstance

The Standards recognize as an aggravating circumstance “refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority.” See Rule 6.2(g), Standards. The court found that Ennenga “admitted the wrongful nature of the misconduct, has explained his involvement completely, and expresses sincere remorse and has been remorseful since the misconduct took place. *He, however, did not openly admit any of these things until shortly before trial.*” The District Court erred in failing to give this factor the weight it was due: Ennenga’s failure to openly admit his wrongdoing is, in essence, a refusal to acknowledge the wrongful nature of his misconduct.

D. The District Court Erred in Finding That Wilson “Made the Misconduct Too Easy”

The Standards identify as an aggravating factor “vulnerability of victim.” See Rule 6.2(h), Standards. The District Court found that “neither Mr. Yarbil nor Ms. Wilson were particularly vulnerable.” [R. 381] The OPC disagrees with this finding with respect to Yarbil because he lives outside of this country, but does not appeal it. The error lies in the court’s next statement: “Ms. Wilson, in fact, made the misconduct too easy.” [R. 381]

Wilson was Ennenga’s client, and by virtue of their attorney-client relationship was entitled to place in him the utmost trust and confidence. Wilson didn’t ask Ennenga where the money was because she believed she already knew: held in trust on her behalf. [R. 410 at 19] Ennenga’s misappropriation of Wilson’s money cannot be excused or explained by blaming her gullibility or complacency. The court’s seemingly

off-handed blame-the-victim comment is inappropriate, and to the extent that the sentiment it expresses may have influenced the court's decision to impose a sanction other than disbarment, was error.

E. Ennenga Had Substantial Experience in the Practice of Law

The Standards recognize as an aggravating factor "substantial experience in the practice of law." See Rule 6.2(i), Standards. The court found that Ennenga was in practice "21 years to the date of the misappropriation of funds." [R. 381] The court did not address the weight of its finding with respect to Ennenga's misappropriation of Wilson's money, nor did it apply the aggravating circumstances to Ennenga's knowing failure to cooperate with the OPC's investigation of his misconduct.

Although an attorney's length of time in practice has little to do with matters of fundamental integrity and honesty,⁹ it has substantial implications for matters concerning an attorney's knowledge of the law. For example, an attorney's lack of experience might in some circumstances mitigate misconduct in the form of incompetence with respect to an area of practice. Ennenga's twenty-one years in practice substantially aggravates his failure to cooperate with the OPC's investigation. He was, or should have been, well aware of his obligations and responsibilities in that connection, and by virtue of his longstanding membership in the Bar, understands the gravity of the reasons behind the rule requiring his cooperation. The District Court's conclusion that this aggravating factor applied only to Ennenga's misappropriation of Wilson's money was error.

⁹ See e.g. In re Blumenstyk, 704 A.2d 1, 12 (N.J. 1997) ("a satisfactory or distinguished career does not lessen the enormity of the knowing misappropriation of a client's funds," and "seems less important to us where misappropriation is involved.").

F. Ennenga's Restitution Was Neither Timely Nor Made in Good Faith

The Standards identify as an aggravating circumstance “lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved.” See Rule 6.2(j), Standards. The District Court found that “Mr. Ennenga has made full restitution, but did not do so until he was under duress.” [R. 381] Although it appears the court concluded this was an aggravating circumstance, its weight was undercut by the court’s finding as a mitigating circumstance that “Mr. Ennenga’s effort was not particularly timely, but *he did completely rectify the consequences to Ms. Wilson.*” [R. 381 (emphasis added)]. The court thus found that Ennenga’s restitution was not timely, and it was made only under duress. This is not a good faith effort within the meaning of the Standards, and is contrary to Rule 6.4’s directive that forced restitution is neither an aggravating nor a mitigating circumstance. See Rule 6.4, Standards.

G. Misappropriation of Funds Is a Significant Instance of Illegal Conduct, and Entitled to Substantial Weight

The Standards recognize as an aggravating factor “illegal conduct, including the use of controlled substances.” See Rule 6.2(k), Standards. The District Court found that “[t]he only illegal conduct that occurred here was the misappropriation of funds.” [R. 381] Thus, the court made the correct finding (i.e. that misappropriation is illegal), but perhaps revealed its attitude towards the factor’s significance when it used the word “only” in describing misappropriation as a species of illegal conduct.

Even a single instance of illegal conduct, particularly something as serious as misappropriation,¹⁰ is entitled to substantial weight in the balancing process in which a

¹⁰ Misappropriation constitutes illegal conduct under several sections of the criminal code. See e.g. Utah Code Ann. § 76-6-404; Utah Code Ann. § 76-404.5.

court must engage when determining whether a departure from the presumptive sanction is warranted. The District Court's minimization of the significance of this factor was error.

III. The District Court's Decision to Suspend Ennenga Was Error

The case law interpreting the Standards is clear: absent truly extraordinary mitigating circumstances, an attorney's theft of client money warrants disbarment. The District Court's decision to suspend rather than disbar Ennenga is error and contrary to established law in light of Ennenga's misappropriation of client funds and multiple instances of failure to cooperate with the OPC's investigations, coupled with the presence of several substantial aggravating circumstances and only minimal mitigation.

A. Even a Single Instance of Misappropriation Can Warrant Disbarment

In attempting to distinguish Ennenga's case from that of Tanner, Stubbs, Babilis, and Ince, the District Court stated merely that Ennenga's misconduct "shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and the time elapsed between misconduct and sanction." [R. 383] The court thus suggests that one of the significant differences between Ennenga and the attorneys who have been disbarred in recent years is the number of incidents involved. Coupled with the court's statement that from its perspective, the other offenses were minor and there was a single serious offense, it appears the court considered Ennenga's single act of misappropriation insufficient to warrant disbarment. This is error.

Of particular significance in an attorney/client context is the statute governing unlawful dealing of property by a fiduciary. See Utah Code Ann. § 76-6-513(2).

The OPC acknowledges that repeated instances of misconduct are more egregious than single instances, and observes that the Standards take account of this by identifying “a pattern of misconduct” and “multiple offenses” as aggravating circumstances. Rule 6.2(c), (d), Standards. Thus, if a respondent violated the Rules, the presumptive sanction might be increased if the misconduct is aggravated by the fact that there is more than one instance and if the instance is of the same nature. The rules do not, however, include a provision identifying “isolated incident” as a mitigating factor, and this is as it should be, especially in matters involving an attorney’s fundamental integrity. The fact that an attorney stole money, but only stole money on one occasion, neither diminishes the nature nor lessens the severity of the misconduct. The OPC urges the Court to reject this as a factor that substantially distinguishes Ennenga’s case from recently reported attorney discipline cases.

Attorney discipline decisions from other jurisdictions are helpful in evaluating the merit of recognizing “isolated incident” as a factor that can legitimately lessen the severity of the sanction imposed. For example, in a case in which the respondent attorney converted client funds to his own use, the Supreme Court of Oregon disbarred him notwithstanding the fact that the conversion was accomplished through a single act of misconduct. See In re Pierson, 571 P.2d 907 (Or. 1977). The court noted its history of disbarring lawyers who convert their clients’ money, and acknowledged that cases prior to Pierson involved more than one instance, whereas Pierson’s conversion involved a single instance. See id. at 909. The court nevertheless disbarred Pierson, and stated as follows:

It is true that in each of those cases the lawyer was accused and found guilty of more than one charge of misappropriation of funds, while the

accused in the instant case is found guilty of only one conversion. We have no reason to believe, however, that any member of the Bar of this state has been led by those decisions to consider or presume that a single instance of misappropriation of a client's funds will be tolerated. If a member entertains such a conception, let his mind be hereby disabused thereof. We hold that *a single conversion by a lawyer to his own use of his client's funds will result in permanent disbarment.*

Id. (emphasis added); see also In re Starks, 520 S.E.2d 687 (Ga. 1999) (single instance of misappropriation, along with other types of misconduct, warranted disbarment); Footte v. Mississippi State Bar Ass'n, 517 So.2d 561 (Miss. 1987) (single instance of misappropriation, along with other types of misconduct, warranted disbarment).

B. The Standards and the Case Law Interpreting Their Application Make It Absolutely Plain That Disbarment Is the Appropriate Ultimate Sanction for Ennenga's Misconduct

As the Court has noted, “[t]o justify a departure from the presumptive level of discipline set forth in the Standards, the aggravating and mitigating factors must be significant.” In re Ince, 957 P.2d at 1238. Moreover, when the weight of the mitigating factors is at least balanced by the aggravating factors, no adjustment to the presumptive discipline is warranted. See id.

In In re Babilis, the Court considered an attorney's conversion of client funds to his own use and adopted as a general rule the principle that “intentional misappropriation of client funds will result in disbarment unless the lawyer can demonstrate truly compelling mitigating circumstances.” In re Babilis, 951 P.2d at 217. The case law developed since then in the Ince, Tanner, and Stubbs cases reinforces the principle articulated in Babilis: fundamentally dishonest acts ordinarily will be sanctioned with disbarment. See In re Babilis, 951 P.2d 207 (Utah 1997); In re Ince, 957 P.2d 1233 (Utah 1998); In re Stubbs, 974 P.2d 296 (Utah 1999); In re Tanner, 960

P.2d 399 (Utah 1998). Ennenga's case is not sufficiently different, nor are the mitigating circumstances sufficiently compelling, to warrant a different outcome.

CONCLUSION

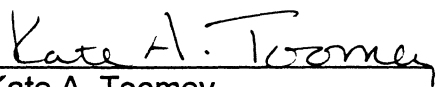
Disciplinary proceedings inquire into an attorney's fitness to practice, not merely into whether the alleged misconduct occurred. Consequently, matters not arising from the misconduct are relevant in aggravation or mitigation of the presumptive sanction. Ideally, the District Court engages in a balanced consideration, guided by established law, of the relevant factors, giving each its appropriate weight. In the instant case, however, the District Court gave undue weight to factors that, in reality, were not particularly compelling and indeed were contrary to established law.

Viewed in context, Ennenga's restitution was coerced, his remorse evident only after his misconduct was discovered, and he benefited from any delay in the proceedings. Given this, the District Court erred in concluding that the evidence of mitigation justified reducing the severity of the presumptive sanction.

The Standards and the recent case law interpreting those Standards are clear: attorneys who steal money should be disbarred absent truly compelling mitigating circumstances. Under the circumstances of this case, which involved Ennenga's misappropriation of client money and little compelling mitigation, the District Court's decision to suspend Ennenga instead of sanctioning his misconduct with disbarment,

was error. The OPC therefore respectfully requests the Court to reverse the order of suspension, and to disbar Ennenga.

DATED: October 23, 2000.


Kate A. Toomey
Deputy Counsel
Office of Professional Conduct

ADDENDUM

Memorandum Decision of January 18, 2000

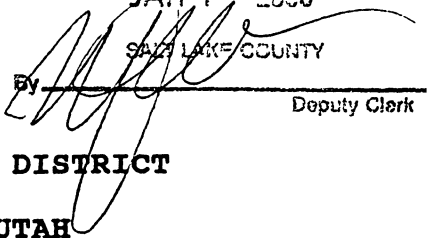
Memorandum Decision of April 3, 2000

Findings of Fact and Conclusions of Law

Order: Suspension

JAN 11 2000

SALT LAKE COUNTY

By  Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline : MEMORANDUM DECISION
of:

: CASE NO. 970905496
PETER M. ENNENGA, #0999 :
Respondent. :
:

At the conclusion of trial on January 11, 2000, the Court took this matter under advisement and now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The respondent is an attorney licensed to practice law in the state of Utah since 1970.

2. In approximately the spring of 1991 JoAnn Wilson retained the respondent to collect various amounts owed her, including a sum in the approximate amount of \$18,000 owed to her business by Thomas E. Soderberg.

3. Respondent collected \$18,000 from Thomas E. Soderberg on or about May 21, 1992.

4. On approximately May 26, 1992, Wilson requested that Ennenga hold the \$18,000 in an interest-bearing escrow account.

5. Respondent never deposited said money in any trust or escrow account, but in October of 1992 deposited a portion of

Wilson's money into his personal checking account, retaining the balance in the form of a cashier's check.

6. Respondent spent all of Wilson's money for personal purposes.

7. In April, 1993, Wilson's accountant requested an accounting of the money from respondent, and respondent failed to provide it.

8. Wilson made several attempts to contact respondent regarding her money and respondent either failed to respond or promised payment, which he failed to do.

9. Wilson filed an informal Complaint against respondent with the OPC on May 30, 1996.

10. Respondent did not pay Wilson her money until June of 1997.

11. Respondent used his position as Wilson's attorney and fiduciary to obtain possession of Wilson's money.

12. Respondent breached his fiduciary duty and converted Wilson's funds for his own use without her permission or knowledge.

13. Taner Yarbil retained respondent on June 3, 1993 on a contingency fee basis to represent him in a civil action.

14. Respondent requested a retainer of \$2,250 of which Yarbil paid respondent \$750.

15. Respondent filed a Complaint on Yarbil's behalf and served one of two defendants in said case, but stopped any actions to prosecute said case and failed to inform Yarbil that he was no longer going to pursue the matter.

16. Yarbil filed an informal Complaint with the OPC on April 15 1995.

17. Beginning in the late 1970's respondent represented Rodney Glover in various matters, including part of a divorce proceeding.

18. Respondent's representation of Glover enabled him to learn certain details regarding Glover's financial condition.

19. On January 29, 1987 respondent obtained from Glover \$7,500 in the form of a loan.

20. Glover received only a form Promissory Note signed by Ennenga, there was no security for the Note, and Ennenga did not provide Glover any information regarding Ennenga's ability to repay the Note.

21. Ennenga did not advise Glover to consult with independent counsel regarding the transaction, and Glover did not consent in writing to the loan arrangement with Ennenga.

22. Ennenga failed to timely repay the loan.

23. Glover filed suit against Ennenga seeking payment, and obtained a Default Judgment against him on March 7, 1989, which Ennenga did not pay.

24. In 1992 Glover retained the services of Raymond Farrell to attempt to collect the money on the Note.

25. The attorney who represented Glover in the lawsuit in which the Judgment was obtained on March 7, 1989 explained to Glover that Ennenga had violated certain Rules of Professional Conduct.

26. Glover filed an informal Complaint with the OPC on February 16, 1993.

27. The OPC sent Ennenga requests for information in response to Wilson's Complaint, Yarbil's Complaint and Glover's Complaint. Ennenga failed to timely respond to any requests for information from the OPC.


CONCLUSIONS OF LAW

1. This Court has already entered Summary Judgment against the defendant on Counts 8 and 13 of the First Amended Complaint and concludes that respondent violated Rule 8.1(b) of the Rules of Professional Conduct, and in said Summary Judgment the Court finds that respondent violated Rules 1.15, 8.4(b)(c), 1.4 and 8.1 with respect to the foregoing Findings of Fact.

2. The Court finds that the statute of limitations bars the OPC Complaint against Ennenga on the Glover matter.

Counsel are to contact the Court and arrange a sanctions hearing pursuant to Rule 11(f) of the Rules of Lawyer Discipline and Disability.

Dated this 18 day of January, 2000.

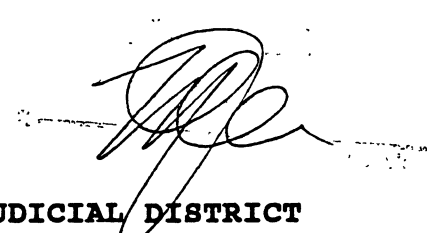

STEPHEN L. HENRIOD
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this_____ day of January, 2000:

Kate A. Toomey
Assistant Counsel
Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111

Brian R. Florence
Attorney for Respondent
5790 Harrison Blvd.
Ogden, Utah 84403



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline :	MEMORANDUM DECISION
of:	
	:
PETER M. ENNENGA, #0999	CASE NO. 970905496
	:
Respondent.	:
	:

This matter was tried on January 11, 2000, after which the Court took the matter under advisement. Prior to trial, Summary Judgment had been entered against respondent on Counts 8 and 13 of the First Amended Complaint, concluding that respondent had violated Rule 8.1(b) of the Rules of Professional Conduct. On January 18, 2000, the Court entered Findings of Fact and Conclusions of Law, concluding that the respondent violated Rule 1.15, Safekeeping Property; 8.4(b), Committing a Criminal Act that Reflects Adversely on the Lawyer's Honesty; 8.4(c), Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation; 1.4, Failing to Communicate with Client; and 8.1, additional conclusions of respondent's Failure to Provide Information to the Office of Professional Conduct. Following the Findings and Conclusions and after a waiver with respect to the time for a sanctions hearing, a hearing was held on March 28, 2000 regarding the issue of sanctions. The Court took the matter under advisement

and now issues this Memorandum Decision with respect to said sanctions.

Pursuant to Rule 3 of the Standards for Imposing Lawyer Sanctions, generally the following factors should be considered:

- a. The duty violated;
- b. The lawyer's mental state;
- c. The potential or actual injury caused by the lawyer's misconduct; and
- d. The existence of aggravating or mitigating factors.

The specific duties violated by Mr. Ennenga with respect to 8.1 were in three separate instances he failed to provide information to the OPC through the normal discovery process in this case. The duty that he violated with respect to Rule 1.4 was in failing to communicate with a client named Yarbil. After taking a partial retainer of \$750 and filing a Complaint, Mr. Ennenga failed to continue to work on the matter and failed to inform Mr. Yarbil of that fact. With respect to Rules 1.15, 8.4(b) and 8.4(c), Mr. Ennenga collected the sum of \$18,000 for his client, Ms. Wilson, in May of 1992. Ms. Wilson requested that Mr. Ennenga hold it in his interest-bearing trust account because she was going through several important changes in her life and felt that the money would be better kept by her attorney. Mr. Ennenga never deposited the money into a trust account, but instead deposited part in his

personal checking account and had part converted into a cashier's check, all of which he took and used for himself. At least part of the money was used to prevent Mr. Ennenga's family home from being foreclosed for failure to make mortgage payments.

The reason that Mr. Ennenga misappropriated Ms. Wilson's money was that he had a history of poor business practices in connection with his law practice which resulted in his personal financial situation being such that he could not make his mortgage payments when due. This objective financial situation was coupled with Mr. Ennenga's subjective inability to inform his wife and children that he was not meeting his financial obligations. Mr. Ennenga knew that Ms. Wilson was not going to require immediate payment of her funds to her, and he stalled her when she started requesting the funds by avoiding discussion of the fund's whereabouts or the specific time that he would remit them to her. Mr. Ennenga testified that he didn't want to lie to Ms. Wilson, but he didn't want to admit that he had taken the funds and no longer had them either. He further testified that he had many thousands of dollars outstanding in the form of accounts receivable and from the time that he took the \$18,000 he believed he would be able to replace it with interest and pay Ms. Wilson her funds when she required them. Of course, this was not the case and he only repaid her in 1997 after her informal complaint against him was filed in 1996 and she

had also retained an attorney to take action against Mr. Ennenga for the money.

Mr. Yarbil did not testify and no evidence was presented to show that he suffered an injury as a result of Mr. Ennenga's misconduct. Mr. Ennenga paid Ms. Wilson the sum of \$30,000 in 1997 covering her principal, plus interest and attorney's fees, and when she testified, she did not claim any further injury.

Rule 4 of the Standards for Imposing Lawyer Sanctions states that absent aggravating or mitigating circumstances, upon application of the factors set forth above from Rule 3, that sanctions are generally appropriate as follows: when a lawyer engages in professional misconduct as defined in Rule 8.4(a), (d), (e) or (f), disbarment is the presumptive sanction. Mr. Ennenga's misappropriation of Ms. Wilson's funds clearly falls into Rule 8.4(a). He acted with the intent to benefit himself. Said conduct also falls within Rule 4.2(b), because the misappropriation of funds was serious criminal conduct and involved misrepresentation to Ms. Wilson and misappropriation of her funds. The other violations fall either under Rule 4.3 or 4.4. Mr. Ennenga knowingly engaged in the misconduct and caused potential injury to the legal system, and interfered with the pending disciplinary action against him.

Unbeknownst to the OPC, Mr. Ennenga had received two prior reprimands which he acknowledged at trial. Said reprimands were for failure to do timely filings in the late 1980's that did not involve money.

The presumptive sanction under Rule 4.2 for respondent's misappropriation of Ms. Wilson's money is disbarment.

The next step in the analysis of the appropriate sanction is consideration of the aggravating and mitigating circumstances set forth in Rule 6. In In re: Babilis, 951 P.2d 215, the Supreme Court explained that, "To justify departure from the presumptive level of discipline set forth in the standards the aggravating and mitigating factors must be significant."

Rule 6.2 provides that aggravating circumstances may include:

(a) Prior record of discipline. There was prior discipline, but not of the same nature as the Wilson misconduct.

(b) Dishonest or selfish motive. Mr. Ennenga's act was to benefit himself and his family.

(c) A pattern of misconduct. The Court does not find a pattern of misconduct in this matter, excepting his reluctance to participate in the disciplinary process against him.

(d) Multiple offenses. While consideration of the rules violated would seem to indicate multiple offenses, it is the trial

court's perspective that there were minor offenses and one stand-alone serious offense, namely, the Wilson matter.

(e) Obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority. Mr. Ennenga admits this.

(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. This has apparently not occurred.

(g) Refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority. Mr. Ennenga has admitted the wrongful nature of the misconduct, has explained his involvement completely, and expresses sincere remorse and has been remorseful since the misconduct took place. He, however, did not openly admit any of these things until shortly before the trial.

(h) Vulnerability of victim. Neither Mr. Yarbil nor Ms. Wilson were particularly vulnerable. Mr. Wilson, in fact, made the misconduct too easy.

(i) Substantial experience in the practice of law. Mr. Ennenga has practiced law for some 30 years, but it was only 21 years to the date of the misappropriation of funds.

(j) Lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved. Mr. Ennenga

has made full restitution, but did not do so until he was under duress.

(k) Illegal conduct, including the use of controlled substances. The only illegal conduct that occurred here was the misappropriation of funds.

The mitigating circumstances set forth in Rule 6.3 are as follows:

(a) Absence of a prior record of discipline. As stated above, there is a prior record of discipline, but less significant than 8.4 and not of the same sort of misconduct.

(b) Absence of a dishonest or selfish motive. Not the case here.

(c) Personal or emotional problems. Mr. Ennenga was suffering personal and emotional problems as a result of his inability to meet his regular financial obligations.

(d) Timely good faith effort to make restitution or to rectify the consequences of the misconduct involved. Mr. Ennenga's effort was not particularly timely, but he did completely rectify the consequences to Ms. Wilson.

(e) Full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct, or cooperative attitude toward proceedings. This did not occur.

(f) Inexperience in the practice of the law. Not applicable.

(g) Good character or reputation. Two attorneys in good standing and two clients of Mr. Ennenga's testified that they believed despite the facts of the instant case, that Mr. Ennenga was a fine attorney with an outstanding reputation for honesty.

(h) Physical disability. Not applicable.

(i) Mental disability or impairment. Not applicable.

(j) Unreasonable delay in the disciplinary proceedings provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay. There was a significant delay in this matter. While Ms. Wilson did not file her complaint against the respondent until 1996, other complaints with respect to other matters referred to above were filed in 1993. The OPC has been conducting an investigation into this matter since 1993, and only filed its Complaint in August of 1997, and its First Amended Complaint in September of 1997. Mr. Ennenga certainly didn't facilitate moving the case forward on a faster track in his refusal to provide information to the Bar through the discovery process, but the delay is attributable as much or more to the OPC as it is to Mr. Ennenga. Mr. Ennenga has not demonstrated prejudice resulting from the delay.

(k) Interim reform. Mr. Ennenga has not had any valid complaints filed against him regarding misconduct after 1992.

(l) Imposition of other penalties or sanctions. The Court is aware of no other penalties or sanctions Mr. Ennenga has suffered.

(m) Remorse. As stated above, Mr. Ennenga is very remorseful and has been since the 1992 misconduct.

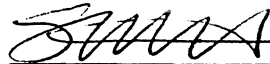
(n) Remoteness of prior offenses. Prior offenses are not particularly significant, but are also not particularly remote in time.

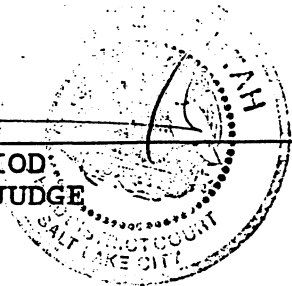
The mitigating circumstances outweigh the aggravating circumstances. In considering appropriate sanctions, the Court has reviewed the Tanner, 346 Utah Adv. Rep. 20, 960 P.2d 399 (1998, Utah Lexis 40); Stubbs, 363 Utah Adv. Rep. 12, 974 P.2d 296 (1999, Utah Lexis 20); Babilis, 332 Utah Adv. Rep. 8, 951 P.2d 207 (1997, Utah Lexis 108); and Ince, 340 Utah Adv. Rep. 53, 957 P.2d 1233 (1998, Utah Lexis 17), matters, wherein trial courts recommended sanctions less than disbarment and the Supreme Court held that disbarment was appropriate. Weighing the misconduct of Mr. Ennenga against the misconduct of Tanner, Stubbs, Babilis and Ince shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and the time elapsed between misconduct and sanction.

Mr. Ennenga makes an ex post facto argument analogizing to criminal punishment. The Court finds that is contrary to case law and not persuasive. These cases involved prolonged activities and repeated instances of serious misconduct.

Mr. Ennenga should be suspended from the practice of law for a period of six months, and when he is readmitted to practice for a period not less than three years, he should have the supervision of an experienced attorney, and he should also participate in psychological or psychiatric counseling prior to practicing law again.

Dated this 3 day of April, 2000.


STEPHEN L. HENRIOD
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 4 day of April, 2000:

Kate A. Toomey
Assistant Counsel
Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111

Brian R. Florence
Attorney for Respondent
5790 Harrison Blvd.
Ogden, Utah 84403



Kate A. Toomey, #6446
Assistant Counsel
OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

MAY 01


IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
PETER M. ENNENGA, #0999)	Civil No. 970905496
Respondent.)	Judge Stephen L. Henriod

This matter was tried on January 11, 2000, after which the Court took the matter under advisement. Prior to trial, Summary Judgment had been entered against respondent on Counts 8 and 13 of the First Amended Complaint, concluding that respondent had violated Rule 8.1(b) of the Rules of Professional Conduct. On January 18, 2000, the Court entered Findings of Fact and Conclusions of Law, concluding that the respondent violated Rule 1.15, Safekeeping Property; 8.4(b), Committing a Criminal Act that Reflects Adversely on the Lawyer's Honesty; 8.4(c), Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation; 1.4, Failing to Communicate with Client; and 8.1, additional conclusions of respondent's Failure to Provide Information to the Office of Professional Conduct. Following the Findings and Conclusions and after a waiver with respect to the time for a sanctions hearing, a

hearing was held on March 28, 2000 regarding the issue of sanctions. The Court took the matter under advisement and hereby makes the following Findings of Fact and Conclusions of Law:

Pursuant to Rule 3 of the Standards for Imposing Lawyer Sanctions, generally the following factors should be considered:

- a. The duty violated;
- b. The lawyer's mental state;
- c. The potential or actual injury caused by the lawyer's misconduct; and
- d. The existence of aggravating or mitigating factors.

The specific duties violated by Mr. Ennenga with respect to 8.1 were in three separate instances he failed to provide information to the OPC through the normal discovery process in this case. The duty that he violated with respect to Rule 1.4 was in failing to communicate with a client named Yarbil. After taking a partial retainer of \$750 and filing a Complaint, Mr. Ennenga failed to continue to work on the matter and failed to inform Mr. Yarbil of that fact. With respect to Rules 1.15, 8.4(b) and 8.4(c), Mr. Ennenga collected the sum of \$18,000 for his client, Ms. Wilson, in May of 1992. Ms. Wilson requested that Mr. Ennenga hold it in his interest-bearing trust account because she was going through several important changes in her life and felt that the money would be better kept by her attorney. Mr. Ennenga never deposited the money into a trust account, but instead deposited part in his personal checking account and had part converted into a cashier's check, all of which he took and used for himself. At least part

of the money was used to prevent Mr. Ennenga's family home from being foreclosed for failure to make mortgage payments.

The reason that Mr. Ennenga misappropriated Ms. Wilson's money was that he had a history of poor business practices in connection with his law practice which resulted in his personal financial situation being such that he could not make his mortgage payments when due. This objective financial situation was coupled with Mr. Ennenga's subjective inability to inform his wife and children that he was not meeting his financial obligations. Mr. Ennenga knew that Ms. Wilson was not going to require immediate payment of her funds to her, and he stalled her when she started requesting the funds by avoiding discussion of the funds' whereabouts or the specific time that he would remit them to her. Mr. Ennenga testified that he didn't want to lie to Ms. Wilson, but he didn't want to admit that he had taken the funds and no longer had them either. He further testified that he had many thousands of dollars outstanding in the form of accounts receivable and from the time that he took the \$18,000 he believed he would be able to replace it with interest and pay Ms. Wilson her funds when she required them. Of course, this was not the case and he only repaid her in 1997 after her informal complaint against him was filed in 1996 and she had also retained an attorney to take action against Mr. Ennenga for the money.

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sum of \$30,000 in 1997 covering her principal, plus interest and attorney's fees, and when she testified, she did not claim any further injury.

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The next step in the analysis of the appropriate sanction is consideration of the aggravating and mitigating circumstances set forth in Rule 6. In In re: Babilis, 951 P.2d 215, the Supreme Court explained that, "To justify departure from the presumptive level

of discipline set forth in the standards the aggravating and mitigating factors must be significant.”

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(c) A pattern of misconduct. The Court does not find a pattern of misconduct in this matter, excepting his reluctance to participate in the disciplinary process against him.

(d) Multiple offenses. While consideration of the rules violated would seem to indicate multiple offenses, it is the trial court’s perspective that there were minor offenses and one stand-alone serious offense, namely, the Wilson matter.

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(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. This has apparently not occurred.

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expresses sincere remorse and has been remorseful since the misconduct took place. He, however, did not openly admit any of these things until shortly before the trial.

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(i) Mental disability or impairment. Not applicable.

(j) Unreasonable delay in the disciplinary proceedings provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay. There was a significant delay in this matter. While Ms. Wilson did not file her complaint against the respondent until 1996, other complaints with respect to other matters referred to above were filed in 1993. The OPC has been conducting an investigation into this matter since 1993, and only filed its Complaint in August of 1997, and its First Amended Complaint in September of 1997. Mr. Ennenga certainly didn't facilitate moving the case forward on a faster track in his refusal to provide information to the Bar through the discovery process, but the delay is attributable as much or more to the OPC as it is to Mr. Ennenga. Mr. Ennenga has not demonstrated prejudice resulting from the delay.

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The mitigating circumstances outweigh the aggravating circumstances. In considering appropriate sanctions, the Court has reviewed the Tanner, 346 Utah Adv. Rep. 20, 960 P.2d 399 (1998, Utah Lexis 40); Stubbs, 363 Utah Adv. Rep. 12, 974 P.2d 296 (1999, Utah Lexis 20); Babilis, 332 Utah Adv. Rep. 8, 951 P.2d 207 (1997, Utah Lexis 108); and Ince, 340 Utah Adv. Rep. 53, 957 P.2d 1233 (1998, Utah Lexis 17), matters, wherein trial courts recommended sanctions less than disbarment and the Supreme Court held that disbarment was appropriate. Weighing the misconduct of Mr. Ennenga against the misconduct of Tanner, Stubbs, Babilis and Ince shows a significant difference in the seriousness of the conduct, both as to the number of incidents, the motive of the attorney, and the time elapsed between misconduct and sanction.

Mr. Ennenga makes an ex post facto argument analogizing to criminal punishment. The Court finds that is contrary to case law and not persuasive. These cases involved prolonged activities and repeated instances of serious misconduct.

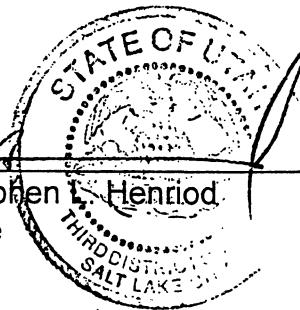
Mr. Ennenga should be suspended from the practice of law for a period of six months, and when he is readmitted to practice for a period not less than three years, he should have the supervision of an experienced attorney, and he should also participate in psychological or psychiatric counseling prior to practicing law again.

DATED this 1 day of ^{May}~~April~~, 2000.


BY THE COURT:



The Honorable Stephen L. Hentrod
District Court Judge



APPROVED AS TO FORM:



Brian R. Florence

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2000, I caused to be mailed via United States first-class mail, postage pre-paid, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to:

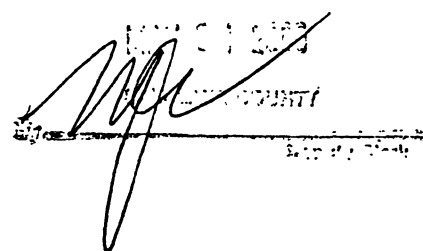
Brian R. Florence
Attorney for Respondent
5790 Harrison Boulevard
Ogden, Utah 84403

Ingrid Kelson

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Kate A. Toomey, #6446
Assistant Counsel
OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

FILED
MAR 29 2000
CLERK OF DISTRICT COURT
SALT LAKE COUNTY, UTAH



IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

**In the Matter of the
Discipline of:**

PETER M. ENNENGA, #0999

Respondent.

)
)
)
)
)
)
ORDER: SUSPENSION

Civil No. 970905496

Judge Stephen L. Henriod

The Court, having reviewed all pleadings and papers filed in this matter, having conducted a sanctions hearing on March 28, 2000 for the purpose of receiving testimony and exhibits, having heard the argument of counsel, having entered its Findings of Fact and Conclusions of Law, and otherwise being fully advised in the premises,

IT IS HEREBY ORDERED that Respondent, Peter M. Ennenga, is suspended from the practice of law for a period of six months.

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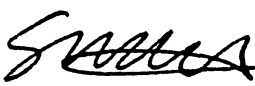
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It is further ordered that when Mr. Ennenga is readmitted to practice, for a period not less than three years he shall have the supervision of an experienced attorney.

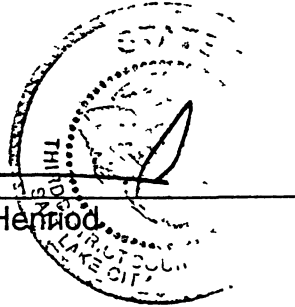
It is further ordered that Mr. Ennenga shall participate in psychological or psychiatric counseling prior to practicing law again.

DATED this 1 day of ^{May}~~April~~ 2000.

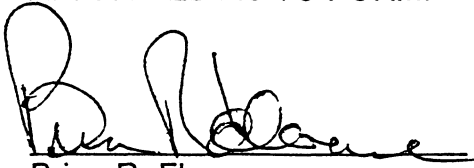
BY THE COURT:



The Honorable Stephen L. Herrod
District Court Judge



APPROVED AS TO FORM:

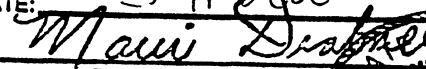


Brian R. Florence

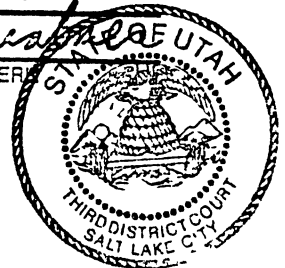
I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE:

5-11-2000



DEPUTY COURT CLERK



CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2000, I caused to be mailed via United States first-class mail, postage pre-paid, a true and correct copy of the foregoing ORDER:

SUSPENSION to:

Brian R. Florence
Attorney for Respondent
5790 Harrison Boulevard
Ogden, Utah 84403

Ingrid Kelson

z:\ennenga peter\formal\plead\order.doc

CERTIFICATE OF SERVICE

I hereby certify that on May 12th, 2000, I caused to be mailed via United States first-class mail, postage pre-paid, a true and correct copy of the foregoing ORDER:

SUSPENSION to:

Brian R. Florence
Attorney for Respondent
5790 Harrison Boulevard
Ogden, Utah 84403

Ingrid Westphal Kelson

z:\ennenga peter\format\plead\order.doc

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of October, 2000, I caused to be mailed via United States mail, first class postage pre-paid, two true and correct copies of the foregoing BRIEF OF APPELLANT to Brian R. Florence, 5790 Harrison Boulevard, Ogden, Utah 84403.

Kate A. Toomey